RECENT DECISIONS.

AGENCY—APPARENT AUTHORITY—FRAUD. The plaintiff stored timber with a dock company and gave the company written authority to accept, for the transfer or delivery of the timber, orders signed by a certain clerk in the plaintiff's employ, whom they authorized to sell timber as their agent. This clerk, in fraud of the plaintiffs, signed an order for the transfer of the timber to a fictitious person in whose name he both sold it to the defendants and gave them orders upon the dock company, by which they obtained delivery of the timber. The defendants were innocent purchasers for value. *Held*, the plaintiffs had enabled their clerk to commit the fraud and therefore could not recover from the defendants either the timber or its value. *Farquharson Brothers & Co.* v. *King & Co.* [1901] 2 K. B. 697. See NOTES, p. 44.

BAILMENTS—BAILEE FOR HIRE—DAMAGES. The plaintiff contracted to thresh certain grain, using for that purpose a traction engine belonging to third parties, with whom he was to share his profits as compensation for the use of the engine. The engine was destroyed by falling through the defendant's bridge, because of a defect in the bridge known to the defendants. The defendants compensated the third parties for their "part of the proceeds of the operation of the said machinery," which would have belonged to them, but refused compensation to the plaintiff. *Held*, the plaintiff could at least recover for the loss of time necessary to secure other motive power by which to carry on his business. *Foster* v. *Commissioners of Lyon Co.* (Kan. May 1901) 64 Pac. 1037.

The case is somewhat novel and no authority is cited in either the majority or dissenting opinion. The decision seems sound. In the usual case of bailee for hire, he may recover from third parties the value of the property, if taken or destroyed by them. *White* v. *Bascom* (1856) 28 Vt. 268; *Raynor* v. *Childs* (1861) 2 F. & F. Where the plaintiff has only a special interest in the property, the value of the property is not always the measure of his relief. He may, therefore, recover the value of his interest. *Moore* v. *Winter* 27 Mo. 382 (1858). The third parties, if we change the principal case by leaving out the bailee, could recover not only the value of the engine, but such net profits resulting from its operation as are not remote or conjectural. *McAfee* v. *Crofford* (1851) 13 How. 447; Sedgwick on Damages, pp. 86, 571. The damages should, however, be limited to those which are unavoidable. The principle seems to be that the bailee, by virtue of his possessory right—an interest in the nature of ownership—should enjoy, in proportion to his interest, the same rights as those possessed by the bailor.

CONSTITUTIONAL LAW—POLICE POWER—PATENT RIGHTS. A Tennessee statute made it a felony to give or receive a promissory note in payment for a patent right, unless it appeared on the face of the note that it was given for such right. *Held*, the act was not an infringement of the constitutional power of Congress to secure to inventors exclusive rights to their discoveries, and among these rights that of selling their patents. *State* v. *Cook* (Tenn. June 1901) 65 S. W. 720.

The validity of such a statute has never been passed upon by the Supreme Court of the United States and among the decisions of the lower courts upon the point there is a decided conflict. The comparatively late decisions holding such statutes invalid are based on the authority of *Ex parte Robinson* (C. C. Ind. 1870) 2 Biss. 309, or cite no authorities at all, or contain but *dicta* upon the point. *Hollida* v. *Hunt* (1873) 70 Ill. 109; *Crittenden* v. *White* (1876) 23 Minn. 24; *Cranson* v. *Smith* (1877) 37 Mich. 309; *State* v. *Lockwood* (1877) 43 Wis. 403.

Ex parte Robinson, *supra*, declared unconstitutional a statute prescribing certain acts as conditions precedent to the legal sale of a patent right within the State of Indiana. The principal case is clearly distinguishable. The statute here involved is a regulation of commercial paper, not a restriction on the sale of patent rights. Its aim is the protection of the makers of negotiable notes, the consideration for which has failed, by preserving this defense against subsequent holders. *Haskell* v. *Jones* (1878) 86 Pa. St. 173; *New* v. *Walker* (1886) 108 Ind. 365; *Herdick* v. *Roesler* (1888) 109 N. Y. 127. The argument of the court in *Hollida* v. *Hunt*, *supra*, that such statutes cannot be regarded as regulations of commercial paper, since they apply only to a particular kind of such paper, seems questionable. This fact may be a ground for claiming that there is illegal discrimination, but certainly the fact that the law affects such notes only as are peculiarly liable to a failure of consideration, and to fraudulent practices, makes it none the less a regulation of commercial paper. *Reeves* v. *Corning* (1892 C. C. Ind.) 51 Fed. 774 upholds a statute prescribing regulations of the sale of patents and cites with approval *Castle* v. *Hutchinson* (1885 C. C. Ind.) 25 Fed. 394, which held unconstitutional a statute like that in the principal case.

CONTRACTS—CONSTRUCTION—TIME OF PERFORMANCE. The plaintiff contracted to give to the Indiana Electric Railway Co. steel rails to to the value of $500 and to loan money necessary to the purchase of such other rails as might be necessary to extend its line to the plaintiff's race-track. The company agreed to "lay said track, and operate it, and have it ready for operation as early as the fifth day of September, 1895." The receipts of the road were to be given to the plaintiff, until his loan on the rails was paid. Four years later, the defendant, which had purchased the Indiana Electric Railway Co., abandoned the service and tore up the rails against the protest of the plaintiff. The plaintiff sought specific performance or damages. *Held*, there was no breach of contract by the defendant. "As the contract does not fix any definite time, during which the company should operate the road, the right to determine that question, so far as the appellant is concerned, remained with the company." The gift was "executed when the company built and operated the road by the day named." *Barney* v. *Indiana Railway Co.* (Ind. Oct. 1901) 61 N. E. 194.

Under this decision, the defendant could legally have ceased to operate the road on September 6, 1895. This was not the intention of the contracting parties. To say that operation for a reasonable length of time, *e. g.* so long as receipts justified it, was contemplated by the parties is not to contradict the contract. The opinion of the court is inconsistent with the provision for repayment of the plaintiff's loan from the receipts. Where no fixed time for performance of the contract is expressed, the court will imply a reasonable time. This has frequently been declared in cases where acts were to be done, but no time had been specified for their performance. *Peabody* v. *Bement* (1889) 79 Mich. 47; *Atwood* v. *Cobb* (1834) 16 Pick. 227; *Pierce* v. *Tenn. Coal & Ry. Co.* (1898) 173 U. S. 1.

"It seems to me the correct mode of ascertaining what reasonable time is in such a case as this is by placing the court and jury in the same situation as the contracting parties were in at the time they made the contract: that is to say, by placing before the jury all those circumstances which were known to both parties at the time the contract was made, and under which the contract itself took place. By so doing, you enable the court and jury to form a safer conclusion as to what is the reasonable time which the law implies, and within which the contract is to be performed." Per ALDERSON, B., in *Ellis* v. *Thompson* (1838) 3 M. & W. 455.

CORPORATIONS—QUO WARRANTO—PLEADING. Where *quo warranto* proceedings were brought against a corporation for usurpation of franchises, a traverse to a plea alleging incorporation was *held* demurrable, since the effect of filing an information against a corporation was an admission of

its existence. *People* v. *Central Union Tel. Co.* (Ill. Oct. 1901) 61 N. E. 428. On principle, an information, based on the usurpation of corporate powers by individuals, ought to be filed against the individuals. *Rex* v. *Cusake* (1620) 2 Roll. R. 113; *Ohio* v. *Gas Light Co.* (1868) 18 Ohio St. 262. It has been thought that a municipal corporation might be an exception, on the doubtful ground of convenience, *Ohio* v. *Gas Light Co.*, *supra*, but there seems to be no decision to that effect in this country. *People* v. *City of Spring Valley* (1889) 129 Ill. 169. Opposed to the principal case is usually cited *People* v. *Bank of Hudson* (1826) 6 Cow. 217, which may possibly be distinguished since the corporation there existed and a misapplication of *Slee* v. *Bloom* (1822) 19 Johns. 456 seems to have been made.

EQUITY—INJUNCTION—DETERMINATION OF TITLE. The defendant had for forty years operated its trains over the land in question, which use the plaintiff city sought to enjoin as a violation of a city ordinance forbidding the obstruction of streets The plaintiff rested his case on a supposed failure to pay in full the award after condemnation proceedings. *Held*, the injunction should be granted. *City of Niagara Falls* v. *The N. Y. C. & H. R. R. Co.* (N. Y. Oct. 1901) 61 N. E. 185.

The court here affirmed the decision below on the ground that it could not question the sufficiency of evidence where the decision of the lower court was unanimous. Mr. Justice O'BRIEN, dissenting, took the position, however, that the power of equity was being used to try a disputed title, and in fact this was the result, a proceeding which does not seem to be justified by precedent. *Rozell* v. *Andrews* (N. Y. 1886) 8 N. E. 513; *Moore* v. *Brooklyn City Ry. Co.* (N. Y. 1888) 15 N. E. 191; *Brass* v. *Rathbone* (N. Y. 1897) 47 N. E. 905. The true remedy was in an action at law. Even waiving this fact, here the plaintiff was permitted to shift the burden upon the defendant, when, by the rules of law applicable in such cases, the plaintiff was bound to prove a better title.

EQUITY—INJUNCTION—JURISDICTION OVER PARTIES. Where a bill was brought against a domestic corporation asking that it be enjoined from committing trespass and waste in a mine located in another State it was *held*, the action was essentially local and the mere fact that the necessary parties were before the court did not give it jurisdiction. *Lindsley* v. *Mining Co.* (Wash. Oct. 1901) 66 Pac. 382.

Where all the parties are before the court of equity, it has jurisdiction in all cases involving trust, fraud or the specific performance of a contract, even though the property affected is beyond the territorial jurisdiction of the court. *Penn* v. *Lord Baltimore* (1750) 1 Vesey Sr. 444; *Massie* v. *Watts* (1810) 6 Cranch 148; *De Klyn* v. *Watkins* (1846) 3 Sand. Ch. 185; *Davis* v. *Morriss* (1881) 76 Va. 21. Actions at law for trespass to real property, however, are essentially local and must be brought in the *forum rei sitæ*. Story on Conflict of Laws, § 554; *Watts* v. *Kinney* (1843) 6 Hill 82. The remedy by injunction is given to prevent a trespass for which an action at law can give no adequate redress and the local character of the proceeding is not changed by bringing the action in a court of equity. *Northern Ind. Ry. Co.* v. *Michigan Cent. Ry. Co.* (1853) 15 How. 233; *Morris* v. *Remington* (1849) 1 Parson's Eq. 387; 2 Leading Cases in Equity, 1817–1832; 2 Story on Eq. Jur. § 743 n.

EQUITY—CONSTRUCTIVE TRUSTS. One B. F. Sutton was appointed guardian for his infant children. To induce his sureties to sign his bond, he promised to take out a policy on his life to secure them against any possible defalcation. With this intention he insured his life naming his children as beneficiaries. He then squandered the wards' property and died. *Held*, the children having collected the proceeds of the policy might also collect from the sureties the amount of their guardian's defalcation. *Herring* v. *Sutton* (N. C. 1901) 39 S. E. 772.

The decision seems to be incorrect. The fact that under Art. 10, § 7, of the Constitution of North Carolina one insuring his life for the benefit of

his children confers upon them a vested right which is good even against creditors has no application to the principal case. B. F. Sutton had no intention of insuring his life in this way. The policy was intended by him as a protection to his sureties, and as against them the children, being donees, took only such title as was consistent with this intention. The sureties have a good equitable defense to a suit on their bond, for the defalcation being less than the value of the policy, has been made good in precisely the manner agreed upon between themselves and their principal. Actual fraud on the part of a donee is not necessary to enable equity to treat him as a constructive trustee of the property received. The Court however seemed to regard this point as established by *Wood* v. *Cherry* (1875) 73 N. C. 110. Conduct tending to defraud others, even without actual fraud, will be deemed sufficient to enable equity to set aside a gift when the donor through inadvertance, ignorance or mistake gave a greater interest than he intended. *Putnam* v. *Reynolds* (1880) 44 Mich. 115.

EVIDENCE—CRIMINAL LAW—ADMISSIBILITY OF EVIDENCE OF OTHER CRIMES —COMPARISON OF HANDWRITINGS. Where the defendant was on trial for the murder of A by means of poison sent through the mails, the prosecution was allowed to give in evidence the alleged murder of B, claimed to have been effected by similar means. *Held* (3 dissenting) such evidence was incompetent where it did not tend to establish or show motive, intent, absence of mistake, a common plan or the identity of the defendant; also, under the Laws of 1880 c. 36, as amended by the Laws of 1888 c. 555, any "disputed writing," though not in issue, may be shown to be the writing of the defendant, by comparison with writings "proved to the satisfaction of the court" to be the genuine handwriting of the defendant, provided the writings to be used for purposes of comparison are not prejudicial to the defendant. *People* v. *Molineux* (N. Y. 1901) 61 N. E. 286. See NOTES, p. 39.

EVIDENCE—PRIVILEGED COMMUNICATIONS. The accused made statements to an attorney admitting homicide. *Held*, the attorney's testimony setting forth this conversation should remain a part of the record because the accused, later in the trial, gave evidence of the same facts. *Knight* v. *People* (Ill. 1901) 61 N. E. 371.

The court cites no cases in support of this opinion and bases its decision wholly on the ground that the admission of the attorney's evidence could not harm the accused. To what extent the defendant may have been forced to take the stand by the evidence so admitted is not considered, The privilege once fixed by the law remains unless removed by the party himself and in the principal case he objected by counsel to the admission of such testimony. The fact that the accused took the stand did not operate as a waiver of a privilege that the law has expressly safeguarded. Wharton on Evidence, 576, and cases there cited; *Bigler* v. *Reyher* (1873) 43 Ind. 112; *Barker* v. *Kuhn* (1874) 38 Iowa 395; *Duttenhofer* v. *The State* (1877) 34 Ohio St. 91.

In the above cases the question of privilege arose on attempted cross-examination and while the point in the principal case is not the same, the inference from the decisions is plain, that the communication was privileged and was admitted without the defendant's consent. The fact remains that in view of the later testimony given by the accused the error was in law not prejudicial.

REAL PROPERTY—ADVERSE POSSESSION—TENANT'S DENIAL OF LANDLORD. In an action of ejectment, it appeared that the defendant, a tenant of the plaintiff's, without vacating the premises, had denied the plaintiff's title and had claimed title by adverse possession. It was shown that actual notice of the defendant's adverse claim was given the plaintiff at a date more than ten years before this suit was begun. *Held*, adverse possession by the tenant began when notice of the tenant's adverse claim came to the knowledge of the plaintiff. *Greenwood* v. *Moore* (Miss. Oct. 1901) 30 So. 609.

This decision is not in accord with the weight of authority. In accordance with the common law rule that a tenant is estopped to deny his landlord's title, Woodfall's Landlord and Tenant 214; *Rowen* v. *Lytle* (1834) 11 Wend. 616, it is held in most jurisdictions that possession by the tenant is the landlord's possession. *Whiting* v. *Edmunds* (1884) 94 N. Y. 309. It is also generally held that a tenant cannot deny his landlord's title until after he has surrendered possession or has done an equivalent act. 3 Washburn on Real Property, 603; *Biglow* v. *Biglow* (1899) 39 App. Div. 103; *Knefel* v. *Daly* (1900) 91 Ill. App. 321; *Mefford* v. *Franklin Co.* (Ky. 1900) 58 S. W. 993; *Pool* v. *Lamb* (N. C. 1901) 37 S. E. 953. Mere disclaimer of the landlord's title by the tenant cannot operate as a disseisin of the landlord except at his election. Washburn on Real Property, *supra; Stearns* v. *Godfrey* (1839) 16 Me. 158. In Pennsylvania there is an exception to this general rule where the tenant is in possession prior to the creation of the relation of landlord and tenant and his assent to the lease is obtained by fraud or mistake. *Theyer* v. *Society of United Brethren* (1852) 20 Pa. St. 60. In California mere possession prior to the acceptance of a lease by the tenant is sufficient to enable the tenant to deny his landlord's title. *Tewksbury* v. *Magraff* (1867) 33 Cal. 237; *Franklin* v. *Merida* (1868) 35 Cal 558. In New York there is a statute by which twenty years after the tenant's disclaimer of his landlord's title, adverse possession begins to run. Code of Civil Procedure § 373.

REAL PROPERTY—CONTINGENT AND VESTED INTERESTS. A testator devised land on certain conditions to his son for life and then to his grandchildren in fee simple, provided always, and the devise in fee simple to be subject to this condition, that no grandchild should take an interest or any estate of inheritance unless such grandchild should attain the age of thirty years, with a provision that if any grandchild die before the age of thirty years leaving issue, the issue should take the share the parent would have taken had he lived to the age of thirty. *Held*, the grandchildren took a vested fee at their births, determinable on their not attaining the age of thirty years. *Chapman* v. *Cheney* (Ill. Oct. 1901) 61 N. E. 363.

The authorities seem to support the principal case. "Although there is no doubt that a devise to a person if he shall live to attain a particular age, standing alone, would be contingent; yet if it be followed by a limitation over in case he die under such age, the devise over is considered as explanatory of the sense in which the testator intended the devisee's interest to depend on his attaining the specified age, namely that on attaining that age it should become absolute and indefeasible. The interest in question, therefore, is construed to vest *instanter*." 1 Jarman on Wills, 5th Ed. 424; *Price* v. *Watkins* (Pa. 1763) 1 Dallas 8; *Phipps* v. *Ackers* (1835) 9 C. & F. 583; *Bowman* v. *Long* (1857) 23 Ga. 242. It is true that the limitation over to the great grandchildren was void in the principal case, but it is difficult to see how this should affect the principle laid down above. The limitation over shows the intention of the testator as clearly in the one case as in the other.

The court does not put its decision on the above ground, but looking at the whole will decides therefrom that the intention of the testator could not have been other than to vest in the grandchildren a bare fee. This ground of decision is questionable, for where the devisor has plainly expressed himself, those words must be followed, though the intention of the testator as found in the whole will is thereby defeated. *Denn* v. *Bagshaw* (1796) 6 T. R. *512; *Holmes* v. *Craddock* (1797) 3 Ves. 347.

REAL PROPERTY—EQUITABLE ESTATE—RULE IN SHELLEY'S CASE. In 1827 a conveyance of land was made to the guardian of an infant married woman, in trust to pay the rents and profits to her for her life, and thereafter to her husband for his life, and after his death, if he survived her, and after her death, whether he be then living or dead, to have and to hold such premises for the sole use, benefit and behoof of her right heirs. *Held*, the rule in Shelley's case did not apply to this conveyance. *Brown* v. *Wadsworth* (N. Y. Oct. 1901) 61 N. E. 250.

The rule in Shelley's case applies to both legal and equitable estates, but not where the prior and subsequent limitations are of different quality, one legal and the other equitable. *Green* v. *Green* (1874) 23 Wall. 486; *Little* v. *Wilcox* (1888) 119 Pa. St. 439. Where lands are given in trust for a person for life and after his death for his heirs, the trustee having some office to perform during the life estate, but one which is limited to that life estate, the legal estate will remain in the trustee during the life estate, but the limitation to the heirs will be executed in them. *Shapland* v. *Smith* (1780) 1 B. C. C. 75; *Doe* v. *Ironmonger* (1803) 3 East, 533. In such a case, the prior limitation being equitable, and the subsequent limitation being legal, the heirs take as purchasers. *Ware* v. *Richardson* (1852) 3 Md. 505, and cases cited *supra*. In the principal case the *cestui que trust* being a married woman, there was an office in the trustee during her life. *Richardson* v. *Stodder* (1868) 100 Mass. 528. But the duty expired with her estate, and the trust for the right heirs being a formal one only, was executed, and became a legal estate. *Robinson* v. *Grey* (1807) 9 East, 1. It seems clear therefore that the rule in Shelley's case does not apply.

REAL PROPERTY—NAVIGABLE WATERS—LEGISLATIVE AUTHORITY. Where a corporation was authorized by the legislature to erect a dam at the outlet of the lake and to raise or lower the water level, and as a result the public rights of navigation and fishing were interfered with, such authorization was *held*, a defense to a suit for an injunction to restrain the corporation from changing the water level. *State* v. *Sunapee Dam Co.* (N. H. March 1901) 50 Atl. 108.

This decision proceeds on the theory that although navigable waters are held in trust by the State for the use and benefit of the people "the beneficiaries and the trustee, acting as body politic and trustee, can authorize by their legislative agents even an extinguishment of the trust estate." The doctrine as thus broadly stated is squarely opposed to that of the United States Supreme Court. *Illinois Central R. R. Co.* v. *Illinois* (1892) 146 U. S. 387, 453. State legislatures may grant rights and privileges in navigable waters which are for the public good, as the right to erect bridges. *Com.* v. *Breed* (1827) 4 Pick. 460; *Com.* v. *Taunton* (1863) 7 Allen 309; *Dietrich* v. *Schremms* (1898) 117 Mich. 298. And in the absence of Congressional action the Federal courts will not declare such grants void. *Willson* v. *Black Bird Creek Marsh Co.* (1829) 2 Peters 245; *Pound* v. *Turck* (1877) 95 U. S. 459. But the trust devolving upon the state for the public cannot be relinquished to the substantial impairment of the public interest. *Illinois Central R. R. Co.* v. *Illinois*, *supra*.

REAL PROPERTY—PARTY WALL EASEMENTS. The owner erected a building on one half of a city lot and conveyed the other half to the defendants, describing the boundary as the center of the building wall. The deed gave the grantee the right to extend the wall backwards, one half on each side of the boundary line. *Held*, it was the intention of the parties to reserve to the grantor a party wall easement in the whole wall. *Cartright* v. *Adair* (Ind. Oct. 1901) 61 N. E. 240.

It has been held that where the owner of two adjoining lots sells one, retaining the other, the vendee takes subject to the burdens, which have been imposed and appear, at the time of the sale, to be upon the lot sold, for the benefit of the lot retained. *Pyer* v. *Carter* (1837) 1 H. & N. 916. The tendency of the later decisions seems to be towards a restriction of the rule, giving to the grantee the benefits apparently existing in favor of the purchased land, but imposing burdens on such land only in cases of extreme necessity, where it would be unreasonable to suppose that the parties intended otherwise. *Suffield* v. *Brown* (1864) 4 DeG. J. & S. 185.

In the case last cited, *Pyer* v. *Carter*, *supra*, is expressly overruled (see p. 196). See also *Bass* v. *Dyer* (1878) 125 Mass. 287; *Sloat* v. *McDougal* (1890) 9 N. Y. Supp. 631; *Paine* v. *Chandler* (1892) 134 N. Y. 385. *Lampman* v. *Milks* (1860) 21 N. Y. 505, is not an authority

for the decision in the principal case. In that case the court implied a grant, not a revocation of an easement. *Cf. Paine* v. *Chandler*, *supra*, at p. 388. See also *Havens* v. *Klein* (1875) 51 How. Prac. 82.

REAL PROPERTY—RIPARIAN RIGHTS.—DIVERSION OF AN INTERSTATE WATERCOURSE. Where the legislature of New York authorized the diversion of a stream, which flowed into Connecticut, for the purpose of increasing the water supply of the City of New York, it was *held*, riparian owners in Connecticut might obtain an injunction restraining the diversion, and need not be content with compensation for the injury. *Pine et al.* v. *The Mayor etc. of the City of New York* (C. C. A.) N. Y. Law Journal, Nov. 20, 1901. See NOTES, p. 47.

STATUTES—NEW YORK CODE OF CIVIL PROCEDURE—RIGHTS OF TESTATOR'S CREDITORS AGAINST DEVISEES. An insolvent testator devised property charged with the payment of the appellant's debt. *Held*, the testator could not prefer the appellant over the other creditors, nor did the devise prevent the sale of the land by order of the surrogate for the benefit of all the creditors. *In the Matter of Richmond*, N. Y. Law Journal, Nov. 15, 1901.

The New York Code of Civil Procedure § 2749 provides for the sale of a decedent's real estate, for the payment of his just debts, except where there is a devise subject by express charge to "the payment of his debts." The decision under discussion interprets the word "debts," as used in this section, to mean *all* debts. The exception to the general provision for the payment of debts from the testator's real estate does not include a devise subject to the payment of a particular debt, or class of debts. As a consequence, such a devise does not bar the general creditors from their statutory right to procure an order for sale from the surrogate.

It is difficult to see how the decision can be based on § 2759 of the Code. That section limits the exception found in § 2749, *supra*, to cases where the devise is effectual. But the very question in dispute here is whether this devise is effectual so as to bar the appellee's right to an order for sale from the surrogate. Since the appellant's debt is an express charge on the property devised, it would seem that he had no right to an order from the surrogate, Code § 2749; *In re Coutant's Estate* (1898) 53 N. Y. Supp. 713, it not appearing that the enforcement of the charge was impracticable. The principal case, it should be noted, is one of the first impression.

STATUTES—FAILURE OF TESTAMENTARY WITNESS TO GIVE ADDRESS. The plaintiff, a legatee under a will which the defendant witnessed, sought to collect a penalty under a statute which provides that any legatee under a will may recover a penalty of fifty dollars from any witness to the will who has failed to give his place of residence, or against any person who has signed the testator's name to a will and has failed to write his own as witness. *Held*, the constitutionality of this statute not being before the court could not be decided, and the statute of limitations did not begin to run until the death of the testator. *Dodge* v. *Cornelius* (N. Y. Oct. 1901) 61 N. E. 244.

This decision gives effect to a statute (2 Rev. St. p. 64, § 41, Edmond's ed.) which, though enacted in 1830, was never made the basis of an action, until the present case arose.

STATUTES—INTERPRETATION—MANDAMUS. The charter under which the defendant operated (Laws 1846 c. 216) provided that the defendant should construct and maintain passage ways for convenient access from the relator's land to a river between which and the relator's land the defendant built its road. *Held*, the defendant was under no obligation to maintain culverts through its embankments in such condition as they were when originally made, provided at any given time they were sufficient to meet existing necessities. *People ex rel. etc.* v. *N. Y. C. & H. R. Ry. Co.* (N. Y. Oct. 1901) 61 N. E. 172.

The reasons for this interpretation of the statute are sufficiently evident, but it is not so clear that the principle involved, concerning the rights of the relator, "is illustrated by cases where a covenant confessedly binding upon a defendant will not be enforced in equity by reason of changed conditions." As the court admits, this principle applies only where a defendant is under an obligation "confessedly binding," whereas the defendant in this case was not bound. This statement seems to be a *dictum*. It is important, however, in that it shows that the court, though admitting that a relator has the right claimed by him, considers it within its power to refuse to enforce such right by a peremptory writ of mandamus, provided conditions have so changed as to render its issue of little benefit to the relator and of much hardship to the defendant. High on Extraordinary Remedies, 3rd Ed. §§ 1–23; 315–322, and cases there cited.

TAXATION—ASSESSMENT OF CORPORATE FRANCHISES. The Illinois Board of Equalization, having power to adopt such rules for assessing corporate franchises as it should see fit, adopted as a basis of assessment the sum of the market value of the shares of capital stock and the market value of the funded debt, less the assessed value of all tangible property. Afterwards the Board eliminated the amount of the funded debt from the basis of assessment. A petition for a writ of mandamus being filed to compel the Board to make a more equitable assessment, it was *held*, the Board had disregarded all just rules of assessment and, the rules adopted being passed for the occasion, the petition should be granted to compel the Board to include in its assessment the value of the funded debt. *State Board of Equalization* v. *People ex rel Goggin* (Ill. Oct. 1901) 61 N. E. 339. See NOTES p. 43.

TAXATION—REMEDY BY CERTIORARI IN NEW YORK. The relator applied to the commissioners of taxes in the City of New York to have an assessment on her property reduced as being erroneous by reason of over-valuation and inequality. The commissioners after consideration refused such reduction and, as required by law, delivered the assessment roll to the municipal assembly on the first Monday of July 1899. On Aug. 14th following, the relator by petition to the Supreme Court obtained a writ of *certiorari* directed to the commissioners under § 906 of the Greater New York Charter, to which writ the commissioners filed their return in due form. At the hearing before the Special Term the relator abandoned the ground of inequality and moved for the appointment of a referee to take evidence on the question of over-valuation. The commissioners objected, on the ground that the assessments by deputy tax commissioners are made by such deputies as independent officers; that, in the absence of complaint and proper proof of error, these assessments are final; that the Board of Taxes and Assessments in reviewing these assessments sits only as an appellate tribunal; that the proceeding in the Supreme Court under a writ of *certiorari* is the same as on a motion for a new trial in an action at law and that it must appear *from the return to the writ* that the relator has been aggrieved before the court has jurisdiction to grant the writ. The commissioners also moved to quash the writ on two grounds: (1) that the petition had not been seasonably filed and (2) that the relator's failure to take testimony before the deputy commissioners was an irregularity which disqualified her from suing out the writ. *Held*, (1) the deputy tax commissioners are merely agents of the Board of Taxes and Assessments, and said Board sits as a court of original and not merely appellate jurisdiction when reconsidering assessments, construing §§ 887–895 Greater New York Charter; (2) the return to a writ of *certiorari* is not conclusive but is to be regarded merely as an answer to the petition and the relator as a matter of right may demand the taking of evidence necessary to the proper determination of any issues of fact so raised, *People ex rel Manhattan Ry.* v. *Barker* (1897) 152 N. Y. 417; (3) Laws of 1896, c. 908, § 251, requiring the application to be made within fifteen days after the filing of the assessment roll does not apply when the property assessed is in New York City, *People ex rel Bronx Gas Co.* v.

Barker (1897) 22 App. Div. 161; (4) the relator's application to the commissioners was substantially in accord with the statute, construing § 906 Greater New York Charter, and her failure to take testimony was no bar to her obtaining the writ. *People ex rel. Thompson* v. *Feitner* (N. Y. Nov. 1901) 61 N. E. 763.

Although this case applies only to New York City its importance justifies a somewhat detailed statement of the facts. Aside from the construction of portions of the Greater New York Charter, it is valuable as illustrating a use of the writ of *certiorari* peculiar to New York. In this jurisdiction the writ may be employed to bring about a retrial of the issues of fact passed upon by the lower tribunal and not as at common law and under the Code, merely the issues of law. The principal case shows the relator's right to demand the taking of testimony and is in accord with the tendency of the decisions. For an exhaustive discussion of this new use of *certiorari*, see 1 COLUMBIA LAW REVIEW 419.

TORTS—CONSPIRACY—BOYCOTT—TRADE UNION. The appellants, officers and members of a trade union, in pursuance of a conspiracy formed by them, maliciously induced customers of the respondent, who was not a member of the union, to cease to deal with him, and servants of his, not to continue in his employment. In a suit brought to recover damages to his business, as butcher, suffered by reason of such conduct, it was *held*, he had a right of action. *Allen* v. *Flood* [1898] A. C. 1 (H. L.), explained and distinguished; judgment of Court of Appeal in Ireland, [1899] 2 I. R. 667, affirmed. *Quinn* v. *Leathem* [1901] A. C. 495 (H. L.). See NOTES, p. 37.

TORTS—LIBEL—PRIVILEGE. The defendant published in his newspaper the substance of a pleading, containing defamatory matter, filed by one who was the defendant in a suit which the present plaintiff was prosecuting. *Held*, while the publication of judicial proceedings is privileged, the publication of preliminary matter is not so privileged. *Sutton* v. *Belo* (Tex. June 1901) 64 S. W. 686.

The publication of preliminary proceedings has been discouraged by decisions in some jurisdictions. *Cowley* v. *Pulsifer* (1884) 137 Mass. 392; *Gazette Co.* v. *Timberlake* (1860) 10 Ohio St. 548. But a better view on principle and one more in accord with the modern authorities is that the publication of any judicial proceedings, whether preliminary or final, should be privileged. Pollock on Torts 259; *Kimber* v. *Press Ass'n* (1893) 62 L. J. Q. B. 152; *Ackerman* v. *Jones* (1874) 5 J. & S. 42; *Salisbury* v. *Union Advertiser Co.* (1887) 45 Hun 120; *McBee* v. *Fulton* (1877) 37 Md. 403; *Metcalf* v. *Times Pub. Co.* (R. I. 1898) 60 Atl. 869. In New York there is a statute confirming the common law and providing that reports of any judicial proceedings are privileged. Code of Civil Procedure § 1907.

TORTS—MASTER AND SERVANT—FELLOW SERVANT. The defendant's mine boss, having control of the mine in place of the defendant, charged a miner under him with his own duties as boss. The plaintiff was injured by the falling in of the roof of an entry to the mine. *Held*, the care of the entries of the mine was the duty of the owner. The miner, to whom the boss had delegated this duty, was not a fellow servant of the plaintiff, and his negligence was that of the boss, whose negligence was the defendant's. *Welston Coal Co.* v. *Smith* (Ohio June 1901) 61 N. E. 143.

This decision seems sound and is in harmony with the legislative policy of Ohio in regard to employers' liability for the conditions of their mines (Rev. St. § 6871). The master's liability depends, not on the rank of the employee to whom he has delegated his duty, but on the character of the duty. He is liable for an omission, either by himself or his representative, of a duty which he owes his servants. *Crispin* v. *Babbit* (1880) 81 N. Y. 516; *Fleke* v. *Ry. Co.* (1873) 53 N. Y. 549.

TORTS—MASTER AND SERVANT—SCOPE OF AUTHORITY. The foreman of the defendant railroad company, while in charge of a push car, with which he

was instructed to carry his men to places where old ties were to be burned or given away, violated his orders by lending the car to an Italian under him. While carrying the ties to his home, the Italian negligently ran over the plaintiff at a grade crossing. *Held*, the company was liable for the failure of its foreman to use the car with reasonable care, since his negligence resulted in injury to one lawfully on its track. *Erie Ry. Co.* v. *Salisbury* (N. J. Sept. 1901) 50 Atl. 117.

Five of the twelve justices dissented, but gave no opinion. The majority opinion seems to be a development of earlier New Jersey cases. The railroads in that jurisdiction are required to exercise greater care and their liability is more nearly absolute than in some other States. *Smith* v. *Railroad Co.* (1884) 46 N. J. L. 7; *Railroad Co.* v. *Salmon* (1877) 39 N. J. L. 299. The decision is placed upon this ground and not upon the untenable principle that the foreman was acting within the scope of his authority. Some other jurisdictions would have reached a different conclusion on the same facts. *Robinson* v. *McNeill* (Wash. 1897) 51 Pac. 355; *Smith* v. *N. Y. etc. Ry. Co.* (1894) 78 Hun 524.

TORTS—NEGLIGENCE—MANUFACTURER'S LIABILITY FOR DEFECTS IN THE ARTICLES. The plaintiff purchased from the defendant a harvesting machine specially constructed for use on a hillside. By reason of a defective nut, the machine came apart throwing the plaintiff into the teeth of the machine and badly injuring him. *Held*, the jury were justified in finding that the injury was due to the negligenee of the defendant in the construction and manufacture of the machine. *Snyder* v. *Holt Mfg. Co.* (Cal. Oct. 1901) 66 Pac. 311.

It is well settled that in the ordinary case where a cause of action for personal injuries arises from a breach of contract there must be some privity between the defendant and the person injured. *Curtin* v. *Somerset* (1891) 140 Pa. St. 70; *Losee* v. *Clute* (1873) 51 N. Y. 494. Even where the plaintiff is an employee of the vendee the manufacturer is not liable. *Heizer* v. *Kingsland & Douglas Mfg. Co.* (1892) 110 Mo. 605. But if the article is inherently dangerous any one injured thereby may recover against the manufacturer. *Thomas* v. *Winchester* (1852) 2 Seld. 397; *Wellington* v. *Oil Co.* (1870) 104 Mass. 64; *Schubert* v. *J. R. Clark Co.* (1892) 49 Minn. 331. In the principal case the plaintiff was the vendee and the liability of the manufacturer was therefore clear.

WILLS—DEVISE TO UNINCORPORATED SOCIETY—CHARITABLE TRUST. Where the words of a devise were: "The residue of my estate * * * shall be disposed of as follows; that is to say, to * * * The American Home Missionary Society I give * * *" and the devisee was an unincorporated charitable society incapable of taking land, *held*, the land descended to the testator's heir at law charged with a charitable trust in favor of the society. *American Bible Society* v. *American Tract Society* (N. J. Oct. 1901) 50 Atl. 67.

This case is an excellent illustration of the readiness of the courts in certain jurisdictions not only to enforce charitable uses but to imply them. It seems to be an extension of the doctrine of an earlier case decided by the same court. *De Camp* v. *Dobbins* (1879) 31 N. J. Eq. 671. There a testatrix, in a devise to one capable of taking legal title for charitable objects, mentioned objects in her will that were apparently charitable but not conclusively so; and it was held that extrinsic evidence was admissible to prove that the objects were in fact charitable in consequence of which the use was good. But here not only was the devisee unable to take legal title, but the devise contained no words indicative of a trust at all.

The assertion of the court that "by necessary implication a gift to the society is a gift in trust for its proper objects" seems to assume the point in issue. Such an implication is opposed to the unambiguous language of the devise. The natural and proper inference to be drawn from the words of the testator is that he intended an absolute gift. This gift was void. The heir at law should, therefore, have taken the land as the testator left it, free from any charge. *Matter of Griffin* (1901) 167 N. Y. 71.